Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 98-204
Broadcast and Cable	)	
Equal Employment Opportunity	)	
Rules and Policies	)	
and	)	
Termination of the	)	MM Docket No. 96-16
EEO Streamlining Proceeding	)	

COMMENTS OF UCC, et. al.

Office of Communication, Inc., United Church of Christ
National Council of the Churches of Christ
in the U.S.A., Office of Communication,
Evangelical Lutheran Church in America
Presbyterian Church (U.S.A.)
United Methodist Church, Ecumenical Office
American Baptist Churches, USA
Black Citizens for a Fair Media

in Support of Proposed Equal Employment Opportunity Rule

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To the Commission:

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The following comments are filed on behalf of the Office of Communication, Inc., United Church of Christ ("UCC"), National Council of the Churches of Christ in the U.S.A., Office of Communication, Evangelical Lutheran Church of America, Presbyterian Church (U.S.A.), United Methodist Church, Ecumenical Office, American Baptist Churches, USA, and Black Citizens for a Fair Media, in support of the Federal Communications Commission's ("Commission") Proposed Equal Employment Opportunity Rule and Policies, ("EEO Rule") in the above-captioned rulemaking proceeding. All of the commenters

hold a long-standing interest in the equal employment of minorities and women in the American workforce.[1]

The Commission adopted the first EEO rule for broadcasters in 1969.[2] The rule came as the result of a Petition for Rulemaking filed by UCC in 1967.[3] Using the Commission's own records, the UCC showed that minorities represented only 9.2% of

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[1] The 1.4 million member United Church of Christ is one of America's oldest religious bodies, dating from the 1650's. The Office of Communication conducts a ministry of communication. Since it won standing for the public to participate in FCC licensing proceedings more than 30 years ago (in Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966)), it has regularly appeared before the Commission to protect the rights of minorities and women.

The National Council of the Churches of Christ in the U.S.A. ("NCC") is the preeminent expression in the United States of the movement toward Christian unity. The NCC's 35 member communions, including Protestant, Orthodox and Anglican bodies, work together on a wide range of activities that further Christian unity, witness to the Christian faith, promote peace and justice, and serve people throughout the world. Approximately 52 million United States Christians belong to Churches that hold NCC membership. The Council was formed in 1950 by member churches and 12 previously existing ecumenical agencies whose roots, in some cases, go back to the 19th century.

The 5.2 million member Evangelical Lutheran Church in America was formed in 1987 by a merger of the American Lutheran Church, the Lutheran Church in America and the Association of the Evangelical Lutheran Churches.

The 3.6 million member Presbyterian Church (U.S.A.) is a 1983 union of the Presbyterian Church in the U.S. and the United Presbyterian Church in the U.S.A.

The 9.5 member United Methodist Church was founded in 1908 by a union of the Methodist and the Evangelical United Brethren Churches.

The 1.5 million member American Baptist Churches USA, founded in 1907, have congregations in all 50 states and Puerto Rico.

Black Citizens for a Fair Media (BCFM) is a voluntary organization of both African and white members that devotes its efforts to placing minorities in significant jobs in communications media and to protecting viewers First Amendment rights to receive information about minorities. For more than two decades BCFM has appeared regularly before the Commission to defend the rights of minorities.

[2] In the Matter of Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 F.C.C.2d 240, 16 Rad. Reg.2d (P & F) 1561 (1969).

[3] Petition for Rulemaking, filed April 24, 1967. See In the Matter of Petition for Rulemaking To Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 F.C.C.2d 766 (1968). At the same time, UCC worked to eradicate racial discrimination in broadcasting through the filing of petitions to deny the application of broadcast stations

all broadcast employees and held no decisionmaking positions, a virtual exclusion from broadcasting opportunities.[4] Since the first EEO rule went into effect, there have been only slow increases in the numbers of minorities and women employed in the broadcasting industry. The current statistics show that women represent 41% and minorities, 20.2% of the total broadcasting workforce.[5] For minorities, in twenty-five years, the employment participation, overall and in managerial positions, had risen by under 8 percentage points. These increases are attributable in large part to the existence and enforcement of the EEO rule. A

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engaged in discriminatory practices. The most notable of such challenges involves the WLBT-TV litigation where after a series of lawsuits, the Commission denied the licensee's application for renewal on the basis of demonstrated instances of racial discrimination in hiring and in programming. See Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966); Office of Communication of the United Church of Christ v. F.C.C., 425 F.2d 543 (D.C. Cir. 1969).

[4] See Statement of Everett C. Parker, annexed to these comments. In 1971, two years after the effective date of the first EEO rule, women represented 23.2% and minorities 9.2% of the full-time broadcast work-force. In 1972, women represented 23.2% and minorities, 9.8%. In 1973, women represented 24.1% and minorities 10.9%. In 1974, women represented 25.3% and minorities 11.6%. In 1975, women represented 26.3% and minorities 12.2%. However, with respect to officials and managerial positions, the absence of women and minorities is revealed as more stark. In 1971, in the officials and manager category of jobs, black males represented 1.8%. By 1975, that number had only risen to 2.3%. For the same years, Black females constituted 0.4% and 1%, respectively; Spanish-surnamed males represented 1.7% and 1.8% respectively; and Spanish-surnamed females, 0.1% and 0.4% respectively. In the professional category, Black males represented 4.5% in 1971 and 5.2% in 1975; Black females represented 0.9% and 1.9% respectively; Spanish-surnamed females represented 0.2% and 0.5% respectively; and Spanish-surnamed males represented 1.8% and 2.7% respectively. All told, in 1975, of the managerial level positions, women represented 13.26% and minorities, 9.6%. The statistics for Native Americans and Asian Americans were even poorer. See Nondiscrimination in the Employment Policies and Practices of Broadcast Licenses, 60 F.C.C.2d 226, 230, 258 (1976).

[5] See 1997 Broadcast and Cable Employment Report, showing employment for stations having five or more full-time employees.

historical review of the employment practices in the industry shows that during the period of the deregulation of broadcasting, a period of relatively lax enforcement of the EEO rule, increases in minority employment slowed.[6] These trends convince us that the inclusion of women and minorities in broadcasting and cable can only be assured through both an EEO rule and vigorous enforcement.

Constitutionality of Proposed EEO Rule

As the Commission states in the NPRM, the instant proceeding was in large part prompted by the decision of the Court of Appeals in Lutheran Church-Missouri Synod v. Federal Communications Commission,[7] ("Lutheran"), in which the court found that the then equal employment opportunity rule violated the equal protection clause of the Constitution.

The flaw in the former rules which that court pointed to was that the requirement that licensees compare their workforce with the general labor force could be read to require or

[6] From 1975 to 1986, the employment of women moved up by nearly 11 percentage points. By contrast, between 1986 and 1993, the employment of women moved up only a little over 2 percentage points. Similarly, from 1975 and 1986, the employment of minorities increased by nearly 4 percentage points, but between 1986 and 1993, there was an increase of only about 2 percentage points. See In the Matter of Implementation of Commission's Equal Employment Opportunity Rules, 9 F.C.C. CD 6276, 6300-01 (1994); See Nondiscrimination in the Employment Policies and Practices of Broadcast Licenses, 60 F.C.C.2d at 230, 258-59 (1976).

[7] 141 F.3d 344 (D.C. Cir. 1998), reh'g. en banc, denied, 154 F.3d 487 (1998).

encourage "stations to aspire to a workforce that attain[ed] or at least approach[ed], proportional representation",[8] which in the court's view, established a racial classification. What the court found to be a racial classification, in turn was said to have failed to pass strict judicial scrutiny.[9]

The proposed rule addresses the purported flaw in the former rule by the absence of any requirement by licensees to compare the composition of their workforce with the general workforce. Nothing in the proposed rule can be read to set up hiring goals or to encourage hiring decisions on minority and female applications in order to achieve a work force representative of the general labor force. The proposed rule contains no penalty for the failure to hire in such a fashion. No special review of applications or other sanctions is proposed in the case of a licensee's failure to hire women and minorities.[10]

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[8] Id. at 351-52, 353. The court believed that certain of the requirements under the former rules, either singly or in conjunction with others, could be read as influencing ultimate hiring decisions, or otherwise oblige stations to grant some degree of preferences to minorities in hiring. In the court's view, these requirements were infirm to the extent they: required or suggested comparison of the licensee's workforce with the general labor force and that licensees aspire to a workforce that attained or approached proportional representation and imposed burdens or penalties in the form of close reviews of renewal applications and higher forfeiture amounts where an underrepresentation existed.

[9] 141 F.3d at 351.

[10] Of course, to the extent that the failure to hire is an act of unlawful discrimination, some form of sanction is within the Commission's powers. See Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966).

On the contrary, the proposed rule is an equality-ensuring, opportunity-enhancing rule, designed to ensure that no person is excluded from the opportunity to learn of and apply for available positions at broadcast and cable stations on account of race or gender. The proposed rule requires no more than inclusive outreach efforts. As discussed more fully in the annexed Appendix, the courts have held that such outreach and recruitment efforts as described in the proposed rule are race-neutral and involve no constitutional issues.[11]

Furthermore, it should be emphasized that the Lutheran decision holding the former EEO rule unconstitutional must be limited to the facts presented there. Because no one challenged the rule as it applied to women, earlier rulings applying intermediate scrutiny to gender classifications remain undisturbed.

The Commission Has the Statutory Authority and Obligation to Promulgate an Anti-Discrimination And Equal Employment Opportunity Rule

In Title VII of the Civil Rights Act of 1964,[12] Congress declared that racial discrimination in employment violates

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[11] See Appendix, annexed to these comments, at text accompanying notes 51 through 75.

[12] Pub. L. 88-352, 78 Stat. 241, 42 U.S.C. §§2000c, 2000d. Other sections of that Act, and numerous other federal enactments, testify to the public policy against racial discrimination. See Titles IV and VI; Title VIII of the Civil

fundamental public policy.[13] Since the passage of Title VII, federal agencies dispensing federal benefits and regulating activities affected with the public interest have adopted equal employment opportunity policies and anti-discrimination rules applicable to their recipients and regulatees. The Supreme Court affirmed the authority of regulatory agencies to adopt rules "requiring equal employment opportunity and non-discrimination in the employment practices of [their] regulatees" in N.A.A.C.P. v. F.P.C.[14] In that case, the Supreme Court reiterated the Congressional declaration that the elimination of discrimination from our society is an important national goal and affirmed that Congress could authorize an administrative agency such as the FPC to act to combat it.[15] In the case of the FPC, the legislative command under the Power and Gas Acts, i.e., to establish "just and reasonable" rates for the transmission and sale of electric energy and consequently to allow only such rates as will prevent consumers from being charged any unnecessary or illegal costs,[16] could be read to support such authority. The FPC had determined that "the business of

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Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81, 42 U.S.C. § 3601, et. seq. (Fair Housing Act).

[13] See Bob Jones University v. United States, 461 U.S. 574 (1983)(denying tax exemption to university practicing racial discrimination in both hiring and college admission decisions). In that case, the UCC filed an amicus brief in favor of the revocation of the tax exemption.

[14] 425 U.S. 662 (1976).

[15] Id. at 665.

[16] 426 U.S. 665.

transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest," and that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest."[17] As such, the FPC had a clear duty to prevent its regulatees from charging rates based upon illegal, duplicative, or unnecessary labor costs and to the extent that such costs were demonstrably the product of a regulatee's discriminatory employment practices, the FPC should disallow them.[18]

Secondly, the FPC had the "asserted duty to advance the public interest".[19] The Court explained however, that the term "public interest" in a regulatory statute must take its meaning from the purposes of the regulatory legislation. In that case, the principal purpose of the Acts was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices.[20]

In finding the requisite authority in the FPC, the Supreme Court compared the FPC's enabling legislation and functions with

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[17] 425 U.S. at 665
[18] Id. at 668.
[19] Id. at 666.
[20] Id. at 669-70. The Court pointed out that "public interest" was not a broad license to promote the general welfare, but a basis for considering the consequences of discriminatory employment practices on the part of its regulatees only insofar as such consequences are directly related to the FPC's establishment of just and reasonable rates in the public interest. Id. at 671.

those of the Federal Communications Commission. The Court recognized that in the performance of its functions, the Federal Communications Commission had the authority to promulgate rules to prohibit discriminatory employment practices on the part of its licensees and regulatees and that those "regulations were justified as necessary to enable the Commission to satisfy its obligations under the Communications Act, to ensure that licensees' programming fairly reflects the tastes and viewpoints of minority groups."[21] (emphasis added).

That same year, the Second Circuit decided Office of Communication of the United Church of Christ.[22] Relying on N.A.A.C.P. v. F.P.C., the court ruled that the Commission had the power to adopt EEO regulations, "in furtherance of its statutory mandate to ensure that broadcasters serve all segments of the community."[23]

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[21] 425 U.S. at 670, n. 7, citing Office of Communication of United Church of Christ v. FCC, 123 U.S. App D.C. 328, 359 F.2d 994 (1966).

[22] 560 F.2d 529 (2d Cir. 1976).

[23] 560 F.2d at 531. It should be noted that the regulation of broadcast and cable regulatees would not overlap with employment discrimination activities of the EEOC. First, the primary objectives of the two agencies are different. The EEC's objective is to eradicate discrimination and resolve disputes between employees and employers through review and litigation of complaints. Its jurisdiction is limited to businesses having fifteen or more employees, which would exclude more than 62% of all radio and television licensees. In contrast, the Commission's objectives in this area is to deter the exclusion of minorities and women from the participation in the broadcast industry. Its regulations would cover all licensees. In addition, the Commission does not review individual complaints of employment discrimination for purposes of granting individual relief, limiting its consideration to fitness of a licensee to operate a broadcast facility. See S. Jennell Trigg, The Federal Communications Commission's Equal Opportunity Employment Program

Experiences of Women and Minorities in Broadcasting

From its earliest initiatives, the UCC has labored to demonstrate the harmful effects of racial and gender discrimination on both the communications industry and society at large and to point out the striking absence of authentic voices from minority communities in news and entertainment programming. Society suffers from the underutilization of the talents and abilities of the victims of discrimination and from the loss of viewpoints and perspectives as might result from those with different historical and cultural experiences.[24] The Statement of Henry Geller, former General Counsel of the Commission, annexed to these comments, speaks to these issues.

EEO Rule and Vigorous Enforcement Are Needed to Combat Private and Institutional Discriminatory Barriers

An EEO Rule is critical in addressing the problems of both conscious, overt discrimination by individual actors, and systemic and unconscious discrimination, operating against minorities and women seeking entry in the business world. Discriminatory barriers exist in the form of: outreach and

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and the Effect of Adarand Constructors, Inc. v. Pena, 4 CommLaw Conspectus 237, 256 (1996).

[24] See Appendix, annexed to these comments, at text accompanying notes 76 through 86, for a discussion of the social science data on the relevance of race and gender to viewpoints and attitudes.

recruitment practices that do not seek, reach out to or recruit minorities and women; corporate climates that alienate and isolate minorities and women, and restrict opportunities for advancement; and governmental barriers, including the lack of vigorous, consistent monitoring and law enforcement and weaknesses in the formulation and collection of employment related data.[25]

More recently, in 1994, a congressional committee found that minorities continued to have fewer opportunities to develop business skills and attitudes, to obtain necessary resources,

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[25] Good for Business: Making Full Use of the Nation's Human Capital, Report of the Federal Glass Ceiling Commission at 8 (1995)("Glass Ceiling Study"). The study found that white males continued to hold 97% of senior management positions in Fortune 100 industrial and Fortune 500 service industries. Only 0.6% were African-Americans, 0.3% Asian and 0.4% Hispanic. Subtle and unconscious discrimination account for gaps in the employment rates and earnings between men and women and between whites and minorities. See Barbara J. Fick, Symposium on Race and the Law: The Case for Maintaining and Encouraging the Use of Voluntary Affirmative Action in Private Sector Employment, 11 N.D. J. L. Ethics & Pub. Pol'y 159 (1997)(describing various studies showing the effects of unconscious discrimination in various contexts). Unconscious discrimination in our society will tend toward an homogenous work force. Indeed, there is ample evidence from organizational studies that leaders in a variety of situations are likely to show preference for socially similar subordinates and help them get ahead, and so long as whites and males continue to occupy the majority of managerial positions within corporations, the potential for the reproduction and perpetuation of a homogenous workforce will continue.

The first formal report on institutional barriers came from then Vice-President Richard Nixon and the President's Committee on Government Contracts. See President's Comm. on Gov't Contracts, Patterns for Progress: Final Report to President Eisenhower (1960). Since then, numerous other studies have confirmed the impact of such barriers. See United States Commission on Minority Business Development, Final Report 2-6 (1992); see also Small and Minority Business in the Decade of the 1980's (Part 1); Hearings Before the House Comm. on Small Business, 97th Cong., 1st Sess. 4 (1981); H.R. Rep. No. 870, 103 Cong., 2d Sess. 5 (1974); Samuel Doctors & Anne Huff, Minority Enterprise and the President's Council 4-6 (1973).

and to gain experience, which are necessary for the success of small businesses in a competitive environment.[26]

These barriers are circular and vicious. At the entry level they work to block initial entry into competitive markets by minorities and women as owners. The same factors narrow the opportunities for entry level employment in existing non-minority businesses. Even if entry level employment is obtained, biases and prejudices within majority-owned companies inhibit the advancement of minorities and women to managerial positions. The inability of minorities and women to obtain managerial experience and to establish relationships with managers in other companies in turn raise and perpetuate the principal barriers to business ownership.

The proposed EEO rule is an appropriate initiative toward the elimination of some of these barriers to entry by minorities and women and to their advancement to upper level positions. It is directly related to the statutory mandate of program diversity. The dismantling of the barriers may lead to increased numbers of minority and female owners and there is evidence that minority and female owners are more likely to

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[26] H.R. Rep. No. 870, 103d Cong., 2d Sess. 5 (1994). A history of discriminatory treatment by employers has prevented minorities once having gained entry from rising into the management positions that are most likely to lead to business ownership. Congress attributed this underrepresentation to continued discriminatory conduct by employers, labor organizations, employment agencies and joint labor-management committees.

broadcast programs of particular interest to or about minorities.[27] The dismantling will lead to increased managerial experience by minorities and women; and managerial experience is an important step toward ownership.[28] And, since broadcast managers and persons on the same decisionmaking level determine broadcast programming, diversity among managers and decisionmaking personnel will lead to diverse programming.

Moreover, the presence of minorities and females as supervisors of minority and female lower-level employees furthers the end of diverse programming to the extent that their presence facilitates the retention and advancement of other minority and female workers through the ranks. Studies have shown that minority and female supervisors are more supportive, more accepting and fairer than white male supervisors and thus will better facilitate the promotion and advancement of minorities and women to managerial positions and perhaps to ownership.[29]

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[27] See Jeff Dubin & Matthew L. Spitzer, Testing Minority Preferences in Broadcasting, 68 S. Cal. L. Rev. 841 (May 1995). The Dubin & Spitzer study was preceded by an analysis of data on the same subject, prepared by the Congressional Research Service ("CRS") in 1988. The CRS concluded that station ownership by a particular type of minority, tended to increase the amount of programming targeted at that minority as well as at other minorities such as Hispanics, although station ownership by women produced a relatively small increase in programming for women when compared to the increase in programming that minority owners provide to minorities. CONGRESSIONAL RESEARCH SERVICE REPORT 21 (June 29, 1988).

[28] See generally Glass Ceiling Study, supra note 26.

[29] See e.g., S. Jeanquart-Barone, Implications of Racial Diversity in the Supervisor-Subordinate Relationship, 26 J. of Applied Social Psychology 935-44 (June 1996). This study considered the impact of race on the supervisor-

Businesses see a relationship between a diverse labor force and company productivity.[30] In broadcasting, an important example of this attitude is reflected in the decision of some of the largest communications entities in the country to enter into a partnership with the Foundation for Minority Interests in Media, Inc. ("Foundation"). The Foundation was established in 1989. The stated objectives are: to help media companies access information about male and female minorities available for employment in the communications industries; to offer minority youth necessary support, education and skills to obtain jobs in media businesses; and to counsel and inform male and female minorities about employment opportunities in communications. In the partnership, students are placed with a sponsoring media company, and become employees of that company during high school, and obtain training and experience in all aspects of the company's activities. Compensation is paid to these student employees in the form of wages and as tuition paid directly to the students' colleges. The partnership between industry and the Foundation are described more fully in the supporting statement

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subordinate relationship, examining the relationship with minority subordinates reporting to both majority and minority group members. Five areas were considered: supervisory support, developmental opportunities, procedural justice, acceptance or assimilation, and discrimination.

[30] A recent report by the American Management Association concluded that where the senior management team of corporations includes women and persons of different ethnic groups, strong organizational outcome, profits, productivity and increased shareholder value can be expected. American Management

of the executive director of the Foundation, Betty Elam, which is attached to these comments.

Self-Assessment, Recordkeeping, Enforcement

The Commission proposes that regulatees should engage in some self-assessment with respect to their EEO programs on an on-going basis and report annually on such self-assessment. As discussed more fully in the annexed Appendix, the courts have found that certain recruitment practices (such as relying exclusively on word-of-mouth referrals, advertising in papers with little or no minority readership or with a circulation only in white areas, relying on referrals from unions that have been closed to minorities, and residency requirements for applicants), although apparently neutral, can be found to be discriminatory.[31] Accordingly, it is appropriate to require regulatees, in order to avoid such unlawful discriminatory practices, to engage in some form of self-assessment. To that end, the self-assessment should include a consideration of the contacts made to publicize job openings,[32] a re-examination of certain requirements such as residency requirements, which may

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Association, Diverse Top Management Boosts Bottom Line, Business News (July 20, 1998), http: 11 www.amanet.org/research/press.htm.

[31] See Appendix, annexed to these comments, at text accompanying notes 1 through 42.

[32] See Appendix, annexed to these comments, at text accompanying notes 1 through 42.

bear little relationship to actual job functions,[33] cooperation with and challenges to labor unions to assist in efforts to avoid excluding minorities from job opportunities[34] and an examination of the use of particular advertising media that appears calculated to exclude minorities from learning about job openings.[35]

The Commission can and should require regulatees to maintain records to evidence the fulfillment of the obligations imposed by the regulations. As the Second Circuit pointed out in Office of Communication v. F.C.C.,[36] all of the required information would be within the regulatees' own offices, and the evidence of compliance would be generated by virtue of having made the efforts required and by recordkeeping already required by other federal laws. Nothing in the most recent Supreme Court pronouncements preclude the Commission from requiring regulatees to identify the ethnic status, national origin or gender of their employees. In fact, such information is the kind, which when compared to the general labor force, may establish a disparate impact discrimination claim under Title VII.[37]

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[33] See Appendix, annexed to these comments, at text accompanying notes 1 through 42.
[34] See Appendix, annexed to these comments, at text accompanying notes 1 through 42.
[35] See Appendix, annexed to these comments, at text accompanying notes 1 through 42.
[36] 560 F.2d 529, 533-34 (2d Cir. 1977).
[37] U.S. v. Warren, 138 F.3d 1083 (6th Cir. 1998).

Moreover, as the Second Circuit found in Office of Communication v. F.C.C., the statistics collected by the licensees would provide most useful information on industry employment patterns and may raise questions as to the causes of such patterns.[38]

To the extent that the EEO rules are designed to facilitate a diverse workforce, which in turn will lead to diverse programming, the Commission must engage in ongoing enforcement of these rules, through random audits and in response to complaints made to the Commission. Enforcement review should be triggered by formal findings of discrimination by other adjudicatory bodies. It should also be triggered by less than formal evidence, including evidence that might support a Title VII claim of discrimination. Regulatees found to have engaged in unlawful practices or to have willfully violated the rules should be subject to license revocation. Other regulatees who fail to comply with the rules should be subject to increased reporting requirements and forfeiture, depending upon the seriousness of the violation.

Exemption for Small Stations

In 1976, the Commission proposed to exempt stations having fewer than ten employees from the then EEO Rules. The proposal

[38] 560 F.2d at 534.

was challenged successfully in Office of Communication of the United Church of Christ v. F.C.C.[39] The Second Circuit held that such changes in policy "must be rationally and explicitly justified in order to assure 'that the standard is being changed and not ignored, and ...that [the agency] is faithful and not indifferent to the rule of law.'"[40] In support of the proposal, the Commission offered four reasons, each of them rejected by the Second Circuit.

To the claim that the Commission's workload necessitated a change in the rule, the Court responded that the same argument had been made, but rejected by the Commission in the proceeding originally creating the rule and in subsequent proceedings revising the rule. In the court's view, the Commission could not argue that the need for equal employment opportunity had become less urgent in the intervening years. The only arguments left to the Commission were that in the interim, it had discovered that it lacked the resources for enforcement or that the requirements imposed on larger stations would strain its resources. However, the Commission offered no support for such arguments.

On the second asserted reason that no useful purpose would be served by the regulation of the stations proposed to be

[39] Id. at 532.
[40] Id.

exempted, the Court responded that the Commission was changing its prior position which found value in the regulation of such stations (including that the regulations would enable licensees to focus on the best method of assuring effective equal employment opportunity), without any explanation. In addition, the new contention that statistical data could only be useful when large numbers were involved did not address the earlier position that statistics were useful to show industry employment patterns and to raise questions as to the causes of such patterns.

On the third asserted reason, that small stations were unduly burdened by the regulations, the court responded that the Commission did not consider compliance burdensome when the rules were enacted and had offered no evidence to show this in the new proposal to exempt small stations. In fact, the court pointed out, only a few hours each year was required to complete the annual report and the only statistics then required from outside the employer's files could be easily obtained from local public offices.[41] The Commission offered no evidence of any new burdens.

The fourth reason, that even with the exemption, most broadcast employers (84.9%) would still be covered, the court viewed as no reason at all to change a policy that regulated an

[41] 560 F.2d at 535, n.3. The court described the form as consisting of only five pages, simple in its layout and straight-forward in its requirements.

even greater percentage of the industry. Moreover, the effect on the equal employment opportunity goals would have been substantial, more than doubling the number of exempted stations.

In the instant NPRM, the Commission offers the single, although not substantially different, reason that stations having ten or fewer full-time employees have fewer hiring opportunities and would be unduly burdened by the regulations because of their supposed limited financial, personnel and time resources.[42] The Commission does not assert as it did in Office of Communication of the United Church of Christ v. F.C.C., that the regulation of small stations would not be useful, but instead acknowledges the value of the data otherwise collected in enabling the Commission to monitor employment trends in the broadcast industry.

For the reasons articulated in Office of Communication of the United Church of Christ v. F.C.C., an exemption of small stations cannot be justified. Indeed, since that decision, the arguments against an exemption are more compelling and more numerous. As demonstrated, minority and female participation in the form of ownership and employment in the broadcasting industry continues to lag behind that of while males.[43] Minority broadcast ownership is threatened by the increasing

[42] See NPRM at ¶84.
[43] See discussion, supra, note 4.

concentration of ownership of broadcast stations[44] and by discrimination in capturing advertising revenues.[45] The most recent FCC employment report shows only infinitesimal increases by minorities and women from the previous period.[46] Furthermore, in light of recent equal protection rulings by the Supreme Court and by the D.C. Circuit decision in Lutheran, the data the Commission is now requiring of licensees under the proposed EEO rule is considerably lessened. Licensees will not be required to conduct any independent research or to gather data from any outside source. They are not required to make comparisons with the general workforce. Instead, all the records required to be retained will be found in the station's own files and generated by the station's normal employment activities. And, as the Second Circuit ruled in Office of Communication of the United Church of Christ v. F.C.C., the reporting of data already in the

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[44] Minority Commercial Broadcast Ownership in the United States, U.S. Dept. of Commerce, National Telecommunications and Information Administration (1998). ("NTIA Study"). The NTIA Study which found a slowing of ownership of broadcast interests by minorities and a decrease in ownership by Blacks; increased competition in securing high quality nationally syndicated programming, increased difficulty in attracting advertisers and increased difficulty in hiring and retaining personnel. The NTIA concluded, among other things, that these losses may result in fewer employment opportunities for minorities in broadcasting and a less diverse broadcast media."

[45] "When Being No. 1 is Not Enough: The Impact of Advertising Practices on Minority-Owned & Minority-Formatted Broadcast Stations," A Report Prepared by the Civil Rights Forum on Communications Policy, submitted to the Office of Communications Business Opportunities, Federal Communications Commission (1999)(finding that stations that target programming to minority listeners are unable to earn as much advertising revenue as stations that air general market programming and attributing the disparity to racial and ethnic stereotyping, among other factors).

[46] 1997 Broadcasting and Cable Employment Report.

licensees files is no burden at all.

Nor would the program, practices, and recordkeeping requirements of the proposed rule be unduly burdensome to small broadcasters. Compliance would not require stations to take on new and unrelated activities, but only that they broaden and formalize activities, which as employers, they are already and normally engaged in. And, most significantly, when balanced against the statutory obligation of broadcast licensees to operate their stations in the public interest, any burden on licensees is slight and outweighed by the larger concerns.

Moreover, the impact of such an exemption would be greater than that described in Office of Communication of the United Church of Christ v. F.C.C. A recent study of "EEO Programs and Performance" of radio stations operating in Tennessee gives an indication of the impact with respect to one market.[47] The study showed that of the 66 stations which filed Form 395 for 1995, 30 or 45% reported ten or fewer full-time employees, 38 or 58% reported fifteen or fewer full-time employees, and 46 or 70% reported twenty or fewer full-time employees. The median number

[47] David Honig & Andrew Cherry, EEO Programs and EEO Performance at Tennessee Stations (1996), annexed as an Appendix to Comments filed by Minority Media and Telecommunications Council, In the Matter of Streamlining Broadcast EEO Rules and Policies, MM Docket No. 96-16. ("Tennessee Study").

of employees was twelve and the mean 20.2.[48] The study concluded that a proposal to exempt stations with 10 or fewer employees would exempt 45% of the then non-exempt Tennessee stations.[49] Nationwide, the impact of such an exemption would be enormous.

[48] Tennessee Study at 8.
[49] Tennessee Study at 9.

Conclusion

The impact of the electronic media is large. It can be used to our positive advantage when entry is open and inclusive. The proposed EEO rule works to achieve that end. We urge the Commission to adopt the proposed rule and policies.

Respectfully submitted,

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On behalf of
Office of Communication, Inc.,
United Church of Christ
National Council of the Churches of Christ
in the U.S.A., Office of Communication
Evangelical Lutheran Church of America,
Presbyterian Church (U.S.A.),
United Methodist Church, Ecumenical Office
American Baptist Churches, U.S.A.
Black Citizens for a Fair Media

Dated: March 1, 1999

SUPPORTING STATEMENTS
TO
COMMENTS OF U.C.C., et.al.

DECLARATION OF REV. DR. EVERETT C. PARKER

My name is Everett C. Parker.

I am Adjunct Professor of Communications in Fordham University, Bronx, NY. I also serve as an officer of the Emma L. Bowen Foundation for Minority Interests in Media, which I helped found; The Minority Media and Telecommunications Council; the Catholic Hispanic Telecommunications Network; and Black Citizens for a Fair Media, all of whom have an interest in this proceeding.

Formerly, I was Director of the Office of Communication of the United Church of Christ which, in the 1960s, brought the cases that gave standing to the public before Federal Regulatory Agencies. Included was the WLBT-TV, Jackson, Mississippi litigation [Office of Communication of the United Church of Christ v. FCC, 359 F .2d 994 (D.C. Cir. 1966) and Office of Communication of the United Church of Christ v. FCC 425 F .2d 543 (D.C. Cir. 1969).]

The FCC's EEO Rules were adopted as the result of a Petition for Rulemaking filed with the Commission by the Office of Communication in 1967. When the Rules went into effect in 1971, the Office of Communication (not the FCC) tabulated and published the results of the first year's reports from television stations. Variety told it all in a front page banner headline:

TV: WHITE, MALE

Thanks to vigorous public efforts and the FCC's EEO requirements, there has been a significant increase in the

percentage of women and minorities in the communications industries work force, even in upper level jobs. But the latter posts have been, to a great extent, jobs where the EEO hires have been visible to the public, such as on-the-air assignments. Women and minorities have had a difficult time breaking into mid-level policy making posts. For example, only a handful of news directors are either female or minority. And at the very top levels of the gigantic corporations that now control America's communications media--both broadcast and print--female and minority corporate officers are conspicious by their absence.

This rulemaking procedure is essential if we are to ensure that the broadcasting and cable industries, which I greatly respect, go forward vigorously with the hiring and upgrading of women and minorities, and never again tread the path of racial and gender intolerance.

Anyone with a rudimentary knowledge of the American South in pre-civil rights days knows that the absence of equal opportunities for African Americans hurt not only them. It imposed enormous economic and social burdens on Southern business and industry and inflicted great harm to the Southern economy. For example, in 1960 Atlanta and Birmingham were approximately the same size and enjoyed virtually the same gross economic output. Atlanta's business and religious leaders, white and Afro-American decided that job discrimination and under utilization of almost half the available workers were a drag on the local economy.

They championed equal employment opportunities for Afro-Americans, and coined the slogan: Atlanta, The City Too Busy To Hate." While it is true that large numbers of whites moved out of Atlanta's city limits, Atlanta today is one of the most prosperous, fastest growing cities in the nation.

Birmingham, on the other hand, allowed itself to be characterized by Bull Connor and his dogs and fire hoses. Dr. Martin Luther King dubbed it "the most segregated city in America," a sobriquet that stuck. Birmingham is still trying to catch up.

It was not just moral force that broke the back of segregation in the communications industries. There was also the realization that discrimination is a drag on the economy and an impediment to both domestic and global competitiveness. True, there was widespread objection to the FCC's issuance of EEO Rules in response to the petition of the UCC'S Office of Communication. The Rules were said to impose an intolerable burden on stations: keeping records, reporting, most of all finding suitable hires from among people totally strange to station personnel.

Gradually, more and more enlightened industry leaders have realized that inequality of opportunity is the real burden. They understand that strong EEO programs create stronger companies. Broadening of the labor pool broadens horizons. Work place dialogue among a diverse group of creative people inevitably expands the scope and variety of broadcast messages. Programmers can reach out to audiences that otherwise they would not be able

to touch. The rise of only a fraction of a rating point brought about by the pro-competitive impact of work place diversity, and the increase of revenues that results, can more than offset the costs of recruiting and training minorities and women for upper level jobs.

A poor EEO record is typically an indication of a poorly run broadcasting station. By restricting its applicant searches to sources which seldom put forward minorities and women, such a station may never connect with the best available talent. Worse yet, the station thus writes off significant segments of its potential audience.

Undoubtedly, some broadcasters will grumble if the Commission continues to labor to end employment discrimination. The key complaint will be about burdens borne by the employer. I respectfully urge the FCC to examine all facets of the question: "What is a burden?" Ending job discrimination and its negative effects will do far more good for the country--including broadcasters--than will any of the short-sighted proposals in the NPRM to "reduce burdens on broadcasters."

The proposed Rulemaking provides the Commission with a splendid opportunity to act in the public interest by lifting the burden of inequality of opportunity that bears down upon all of us.

Everett C. Parker

March 1, 1999

DECLARATION OF HENRY GELLER

My name is Henry Geller. I am pleased to provide this statement in support of the efforts of MMTC and several other organizations to restore as strong a level of EEO enforcement as feasible by the FCC.

I served as General Counsel of the FCC from 1964 through 1970, the time period essentially bracketing the Civil Rights Act and the adoption of the EEO Rule. The civil rights movement was in full force. It was a wonderful time to have the honor of being a public servant.

The EEO Rule resulted from a petition for rulemaking filed by the Office of Communication of the United Church of Christ (UCC), whose Director was Dr. Everett C. Parker. The petition relied on the 1968 Report of the National Commission on Civil Disorders (the "Kerner Report"). Chapter 15 of the Kerner Report found that the media had failed to communicate to the nation the needs and aspirations of Black Americans, thereby contributing to the enormous social distance which permeated the country then (and is still a problem). The Johnson Administration decided to endorse the UCC Petition, believing that broadcasters must be held to a high standard of equal opportunity because of the essential role of broadcasting in society. Minority and civil rights organizations also endorsed the UCC's Petition, pointing to the inadequate and sometimes inaccurate coverage of the causes and consequences of the civil disorders that were taking place at that time.

Significantly, there was a time in our history when broadcasters were only subject to Title VII and nothing else. That time was the period between 1964 and the adoption of the EEO

Rule, a period when the industry was doing much too little to hire and train minorities and women. The industry's slow progress toward equal opportunity was what motivated the FCC to adopt the EEO Rule in the first place. Although the Civil Rights Act of 1964 prohibited employment discrimination, it was clear to the EEOC, and to us at the FCC, that unless we made equal opportunity a benchmark of public trusteeship, broadcasters would not take the strong steps needed to abolish discrimination and overcome its present effects.

The adoption of the EEO Rule was initially difficult and somewhat controversial because the FCC had limited resources to undertake new initiatives. I argued that we had sufficient resources; the Broadcast Bureau respectfully disagreed. By a closely divided vote and thanks in great part to the advocacy of Commissioner Kenneth Cox, who had been Chief of the Broadcast Bureau in the early 1960's, the Commission adopted the Rule.

The EEO Rule has value as a remedial program, as a means of promoting minority participation and ownership, and as a means of ensuring access for all Americans to the stream of mass communications. It has always had special value in promoting diversity of viewpoints. Over the years, many broadcasters have come to understand that diversity of employment enables them to reach out to groups and markets they might otherwise not have chosen or known how to reach. The EEO Rule is an integral facet of the broadcaster's obligation to operate in the public interest -- to be a fiduciary for its entire area of operation. The

Commission should reaffirm this important policy, and implement it as effectively and fully as possible.

Henry Geller

Henry Geller

February 26, 1999

MEDIA CAREERS
FOR MINORITIES

The Emma L. Bowen Foundation for Minority Interests in Media, Inc.
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DECLARATION BY BETTY ELAM IN SUPPORT OF PROPOSED EEO RULES FOR BROADCAST AND CABLE, MM DOCKET NO. 98-204

Chairman Kennard and his colleagues have challenged media leaders to move forward positively and aggressively in embracing the new proposed EEO rules for Broadcast and Cable. The proposed rulemaking on EEO is timely and respectful of the good judgement of our media leaders. Our nation's communities are changing as more people of color are becoming fully emerged in the media business, as well as shaping the nation's ideals and economic development.

In the Federal Communications Commission Order and Notice of Proposed Rule Making adopted on February 8, 1996, the Commission proposed to encourage media companies to participate in joint recruitment efforts such as minority training, internship and employment programs by giving them credit for participating in such programs. The Commission noted, for example, "that the Foundation for Minority Interests in Media, headquartered in New York City, New York administers a nationwide program "Media Careers for Minorities," for aspiring broadcasters and cable operations. The program, which is funded largely by the broadcast and cable industries, provides high school and college students with paid jobs and assistance with college tuition. "They also selected the Kaitz Foundation which funds internships for minorities in cable." The Kaitz Foundation targets minorities already with two to five years of professional work experience in other companies not in the media business.

Media leaders are called to invest in human skills, training youth as Media Careers for Minorities does so successfully, as an important insurance for the future of media. The Media Careers of Minorities long term goal is that a large percentage of our graduates will become owners or top decision makers in media companies, and will be a great asset to the media industry.

The Chairman believes in the faith of the industry leaders that clearly understand it is only good business to reach out in our communities to seek and train young people in the growing media business. Their inclusion improves the service in the public interest, as well as add to the support of media companies' bottom line.

This medium is so influential in our society that it must embrace our whole society because we are clear this medium communicates to all communities across our nation.

The Media Careers for Minorities program provides summer jobs, and equally matched funds for the students' college tuition. Students are selected during their last two years of high school, and continue with the training program through college graduation. Sixty-three students have graduated from our training program, and ninety percent of our graduates are now working in the media industries. The Foundation, founded in 1989, has brought over 200 students, including African, Hispanic, Asian and Native Americans into our training program.

I declare under penalty of perjury that the foregoing is true and correct.

Betty Elam
Feb. 16, 1998